No. 82-1616

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether confidential statements made by witnesses in an Air Force air crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

PARTIES TO THE PROCEEDING

The respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 688 F.2d 638. The district court's findings of fact and conclusions of law (Pet. App. 21a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on September 21, 1982, and a petition for rehearing was denied on December 3, 1982 (Pet. App. 29a). On February 23, 1983, Justice Rehnquist extended the time within which to file a

petition for a writ of certiorari to and including April 1, 1983. The petition was filed on March 31, 1983, and was granted on June 27, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

1. 5 U.S.C. 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. 5 U.S.C. 552(b)(5) provides:

> (b) This section does not apply to matters that are—
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> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

3. Pertinent provisions of Air Force Regulation 127-4 (Jan. 1, 1973) are set out at Pet. App. 31a-33a. Pertinent provisions of Air Force Regulation 127-4 (Jan. 18, 1980) and Air Force Regulation 110-14 (July 18, 1977) are set out in an appendix to this brief.

STATEMENT

1. The Air Force, like the other military services,[1] has developed an extensive program to promote aircraft safety. The centerpiece of this program is the intensive safety investigation undertaken following any serious aircraft mishap. The sole purpose of this investigation is to determine the cause of the accident and to develop corrective measures to prevent similar mishaps in the future. See A.F. Reg. 127-4 ¶ 2-4.a (Jan. 18, 1980).[2] In addition to examining physical evidence, the Air Force safety investigation board ("safety board") encourages witnesses to come forward with information of any kind that might bear on the cause of the crash. And to encourage the maximum degree of cooperation,[3] witnesses are advised that their statements, which are unsworn, will not be divulged to anyone for any purpose other than safety and accident prevention. A.F. Reg. 127-4 ¶¶ 2-5, 3-8.d (Jan. 18, 1980), Attachment 3.[4] In this way,

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[1] See *Cooper* v. *Department of the Navy*, 558 F.2d 274, 275-276, modified on other grounds, 594 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979).

[2] The safety investigation in this case was conducted pursuant to A.F. Reg. 127-4 (Jan. 1, 1973), pertinent provisions of which are set forth at Pet. App. 31a-33a. The 1980 amendment to this regulation (A.F. Reg. 127-4 (Jan. 18, 1980) (see pages 1a-8a, *infra*)) did not change the privilege or procedures involved here in any material respect.

[3] Such voluntary cooperation is particularly important since the safety board lacks subpoena power. A.F. Reg. 127-4 (Jan. 18, 1980); see also A.F. Reg. 127-4 (Jan. 1, 1973). Air Force members and employees may be ordered to testify, but other witnesses, such as manufacturers' representatives, testify voluntarily.

[4] See also A.F. Reg. 127-4 ¶¶ 12.b, 12.c, and 19.a(3) (Jan. 1, 1973).

the safety board gains access to information that might otherwise be withheld, such as information against a witness's own interests or those of an employer or co-worker and information that may be impressionistic or speculative (J.A. 55). See generally Burton, *Aircraft Accident Investigation*, 14 JAG L. Rev. 233 (1973); Moorman, *Executive Privilege and the Freedom of Information Act*, 21 A.F. L. Rev. 587 (1979).

While most of the factual portions of the safety board's report are released, the Air Force has established strict procedures to maintain the confidentiality (both within and outside the government) of witness statements furnished in confidence.[5] The Air Force credits its safety investigation program, which has been in existence for more than 25 years, with significant results in improving aircraft safety (J.A. 39-40, 43-44).[6]

In addition to the safety investigation, the Air Force routinely conducts a second investigation, termed a "collateral investigation," following any serious aircraft mishap. The collateral investigation is designed to gather and preserve evidence for all purposes other than safety, *i.e.*, for use in official, on-

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[5] A.F. Reg. 127-4 ¶¶ 3-8.d(3), (4), 5-1, 5-2 (Jan. 1, 1980). See also A.F. Reg. 127-4 ¶ 19 (Jan. 1, 1973); A.F. Reg. 110-14 (Nov. 1, 1973); Burton, *Aircraft Accident Investigations*, 14 JAG L. Rev. 233 (1973).

[6] Air Force statistics show that in 1950 it lost 665 aircraft in aircraft mishaps, with 781 fatalities. By 1979, these figures were reduced to only 83 aircraft destroyed, with 77 fatalities. The Air Force attributes this remarkable improvement directly to its "aggressive flight safety program," of which the safety investigation reports are "a most significant and important part." J.A. 39-40.

the-record proceedings, such as courts-martial, disciplinary and administrative proceedings and civil litigation. See A.F. Reg. 110-14 (July 18, 1977).[7] Witnesses are advised of their rights and testify under oath (*ibid.*). Factual information examined and generated by the safety board (including the names of witnesses) is shared with the collateral investigation board,[8] but the investigations themselves are strictly independent. Most important, witness statements given to the safety board under a promise of confidentiality are not divulged to the collateral board.[9]

To protect the integrity of this vital military air safety program, the courts have recognized a civil discovery privilege for confidential witness statements made in connection with military safety investigations. See *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).[10] See also *Mc-*

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[7] The collateral investigation in this case was conducted pursuant to A.F. Reg. 110-14 (Nov. 1, 1973). See Pet. App. 2a n.2.

[8] A.F. Reg. 127-4, ¶ 2-5.d(2), 5-2 (Jan. 18, 1980).

[9] A.F. Reg. 127-4, ¶ 2-5.d(2), 5-2 (Jan. 18, 1980); A.F. Reg. 110-14, ¶ 2.e and f (July 18, 1977).

[10] In *Machin*, an Air Force crewman injured in a plane crash brought suit against the manufacturer of the plane's propeller assemblies and attempted to subpoena the Aircraft Accident Investigative Report prepared by the Air Force. The court of appeals held (316 F.2d at 339) that the statements taken from witnesses who participated in the investigation were privileged. The court added (*ibid.*) that the same privilege "extends to any conclusions that might be based in any fashion on such privileged information." The court also noted (*ibid.*) that the deliberative process privilege "attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued."

Cormick on Evidence § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970). Similarly, two courts of appeals have held that such statements are exempt from disclosure under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." See *Cooper* v. *Department of the Navy*, 558 F.2d 274, modified on other grounds, 549 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

2. In the accident giving rise to the documents at issue in this litigation, an Air Force pilot, Captain Richard Hoover, suffered serious injuries when he ejected from his plane after an engine failure. Pursuant to its regulations, the Air Force conducted both a "collateral investigation" and a "safety investigation." When Captain Hoover brought suit in federal court for damages against the manufacturers of his plane's ejection equipment,[11] two of the defendant companies, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation, sought discovery of the Air Force investigation reports pertaining to the accident. The Air Force released the completed record of the collateral investigation and portions of the safety investigation report. However, relying upon the privilege recognized in *Machin*, the Air Force declined to release confidential statements made in connection with the safety investigation by Captain Hoover and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.)

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[11] *Hoover* v. *Weber Aircraft Corp.*, C.D. Cal. No. CV 74-1064-WPG.

Respondents then filed Freedom of Information Act requests seeking disclosure of the confidential statements, but the Air Force refused to release the records in reliance on Exemption 5. After exhausting administrative remedies, respondents brought this action in the United States District Court for the Central District of California. Pet. App. 3a-4a. In an uncontroverted affidavit filed in district court, Major General Russell, the Commander of the Air Force Inspection and Safety Center, pointed out (J.A. 38-39) that the effectiveness of the Air Force safety investigation program

> depends to a large extent upon [its] ability to obtain full and candid information on the cause of each aircraft accident. * * * Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purposes of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident.

Major General Russell also averred (J.A. 39) that the inability of safety investigators to make enforceable promises of confidentiality "would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similiar accident" and that the privilege against forced disclosure of witness statements is therefore "the very foundation of a successful Air Force flight safety program" (*ibid.*). The Secretary of the Air Force submitted an affidavit as well, concluding (J.A. 55) that public release of witness statements "would effectively dry

up a vital source of information because the promise of confidentiality would no longer be enforceable."

The district court held that the witness statements had been properly withheld under Exemption 5 (Pet. App. 21a-26a, 27a), but a divided panel of the court of appeals reversed, holding that Exemption 5 does not incorporate the *Machin* civil discovery privilege (Pet. App. 1a-9a). The court of appeals relied heavily upon *FOMC* v. *Merrill*, 443 U.S. 340 (1979), in which this Court held that Exemption 5 incorporates a limited privilege for confidential commercial information. The court of appeals acknowledged (Pet. App. 8a n.6), however, that "*Merrill* expressly left open the question whether Exemption 5 incorporates [the *Machin*] privilege."

The court of appeals noted (Pet. App. 6a) the statement in *Merrill* (443 U.S. at 355) that a claim that Exemption 5 incorporates a privilege other than those specifically recognized in the legislative history [12] "must be viewed with caution." Observing that the *Merrill* Court had found evidence in the legislative history that Congress "specifically contemplated a limited privilege for confidential commercial information" (*id.* at 359), the court of appeals stated (Pet. App. 6a; emphasis added): "As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*"

Although the court of appeals assumed "that the witness statements here would be shielded from civil discovery under the *Machin* privilege" (Pet. App.

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[12] The Court stated in *Merrill* (443 U.S. at 355 & n.15) that the deliberative process and the attorney-client and work-product privileges were "expressly mentioned" in the legislative history.

8a), it found no evidence in the legislative history of the FOIA "that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" during a military air crash investigation (*id.* at 10a). The court instead concluded (*id.* at 11a-12a) that Congress intended to protect only legal or policy matters and the exchange of ideas among agency personnel, rather than purely factual material.[13] Accordingly, the court of appeals remanded the case to the district court to determine which portions of the witness statements are factual and which constitute predecisional advice, opinions, or recommendations that may be withheld under the deliberative process privilege incorporated into Exemption 5 (see *id.* at 12a, 18a).[14]

Judge Smith dissented, stressing that "[w]e deal here with the lives of the persons who fly military aircraft" (Pet. App. 18a). Judge Smith stated (*id.* at 19a): "I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe these cases to be sound, and I would follow them and affirm." [15]

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[13] The court of appeals also held (Pet. App. 14a-18a) that traditional equity principles did not justify nondisclosure of the witness statements.

[14] The court of appeals reversed the portion of the district court judgment holding that an Air Force medical report fell within the deliberative process privilege as incorporated into Exemption 5 (see Pet. App. 13a). The court of appeals directed the district court on remand to determine whether parts of the report constituted "factual reporting" and were consequently not covered by that privilege (*ibid.*). This portion of the court of appeals' decision is not at issue here.

[15] After the court of appeals' decision in this case, the Senate passed a provision (*Omnibus Defense Authorization Act,*

SUMMARY OF ARGUMENT

This case concerns the continuing effectiveness of a vital component of the military services' air safety program. When a military aircraft is involved in a serious mishap, the services conduct a formal "collateral investigation," in which testimony is taken on the record and may be used in subsequent administrative and judicial proceedings. They also conduct an independent "safety investigation," the sole purpose of which is accident prevention. In order to obtain complete and candid information from pilots, mechanics, manufacturers' representatives, and others, the safety investigators promise that any information given will be kept confidential and will not be used for any purpose other than safety. As a result of these promises, witnesses are induced to provide information that may lead to life-saving corrective action. If confidentiality could not be assured, witnesses' concerns about their careers and possible financial liability would make them hesitant to furnish information that might tend to establish their responsibility for an accident. Crucial information would thus remain hidden.

Recognizing the important role played by confidential statements made to military aircraft safety investigators, the courts have long accorded those statements privileged status when sought in civil litigation. The court of appeals effectively abolished that

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S. 675, 98th Cong., 1st Sess. § 1009 (1983)) to protect statements such as those involved in this case from disclosure under the FOIA. See S. Rep. No. 98-174, 98th Cong., 1st Sess. 249-250 (1983). Enactment of this proposal has been deferred pending the submission by the Department of Defense of further information concerning its present practices. See S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983).

privilege, however, by making such statements freely available under the Freedom of Information Act. The decision below is wrong for two separate reasons.

A.

Exemption 5 of the Freedom of Information Act protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Exemption thus authorizes nondisclosure of any material routinely privileged in the civil discovery context. Since the statements at issue in this case fall within the well-recognized privilege for confidential statements made by witnesses in a military air crash safety investigation, they are protected by Exemption 5.

Contrary to the holding of the court of appeals, Exemption 5 is not limited to materials covered by one of the privileges expressly mentioned in its legislative history. The language of Exemption 5 provides no support for the proposition that the Exemption protects certain privileged materials but not others. By its terms, Exemption 5 applies without qualification to any internal memorandums or letters that "would not be available by law to a party * * * in litigation with the agency."

The legislative history confirms the broad reach of the statutory language. The Senate Report (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)) states that the purpose of Exemption 5 "is to protect from disclosure * * *those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency". Similarly, the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) states that under Exemption 5 "any

internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." While each report specifically mentions a few types of privileged materials protected by Exemption 5, there is nothing to suggest that these examples were intended as an exhaustive list of the incorporated privileges. Indeed, Congress had every reason for not attempting to compile such a list, *e.g.*, the all-inclusive language of Exemption 5, which made such enumeration unnecessary; the brief space devoted to the exemption in the congressional reports; and the risk of omitting a narrow but valuable privilege.

Consistent with the statutory language and legislative history, this Court repeatedly has observed that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); accord, *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7; see also *NLRB* v *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Although the court of appeals relied heavily upon dicta in *FOMC* v. *Merrill*, 443 U.S. 340, 354-355 (1979), the court read far too much into those statements. Contrary to the decision below, *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5.

The court of appeals' conclusion that "Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history" (Pet. App. 6a) also conflicts with common sense. If the court's construction of Exemption 5 were correct, all

other privileges would be effectively abolished whenever the information sought was held by the government. Any party denied discovery in civil litigation on the basis of such a privilege could obtain the desired information simply by filing a FOIA request. Not only would this make the government a second-class litigant, but it would effectively alter the scope of privileges in purely private suits, such as the tort action for which the statements involved in this case have been sought. There is nothing to suggest that Congress intended such results.

B.

Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, it nevertheless shields the type of statements at issue here.

The legislative history of Exemption 5 provides strong evidence that Congress specifically intended to protect confidential statements given in military air safety investigations. As originally framed, Exemption 5 would not have applied to the type of statements involved in this case, but the provision was changed to substantially its present form by the Senate committee, which stated that its amendments responded to suggestions made by witnesses at the committee hearings. One of the suggestions repeatedly made at those hearings, without eliciting any opposition, was that disclosure of statements made in air crash investigations should not be required.

Thus, here, as in *Merrill* (443 U.S. at 359), "it is reasonable to infer" that Congress "specifically contemplated" that Exemption 5 would cover the materials at issue. Furthermore, in this case, as in *Merrill* (*id.* at 360), the privilege in question does not "substantially duplicate any other FOIA exemp-

tion." Accordingly, under the analysis employed in *Merrill*, disclosure of the privileged statements sought by respondents is not mandated by the FOIA.

Finally, nondisclosure of confidential statements made to military air crash safety investigators is fully consistent with the underlying purposes of the FOIA. Protecting such statements obviously does not contravene Congress' strong aversion to secret agency law. And disclosure would not promote open government, ensure an informed citizenry, or hold government accountable for its actions. If witnesses interviewed by safety investigators could not be promised confidentiality, they would be unlikely to reveal anything not divulged during the parallel collateral investigation. As a result, the information available to the public would not be increased appreciably, while that available to those concerned with aircraft safety would decrease both in quantity and reliability.

ARGUMENT

EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT INCORPORATES THE RECOGNIZED CIVIL DISCOVERY PRIVILEGE FOR CONFIDENTIAL STATEMENTS MADE BY WITNESSES IN MILITARY AIR CRASH SAFETY INVESTIGATIONS

A. Exemption 5 incorporates the privileges enjoyed by the government in the civil discovery context and thus protects the privileged statements at issue here

The plain language of Exemption 5, the legislative history of that provision, and prior decisions of this Court all show that the Freedom of Information Act was not intended to require disclosure of information normally privileged in the civil discovery context. The basis for the court of appeals' decision—that "Exemption 5 embraces only those civil discovery

privileges explicitly recognized in the legislative history" (Pet. App. 6a)—is therefore incorrect.

1. The starting point for analysis—the language of Exemption 5—certainly does not support the court of appeals' construction. Exemption 5 provides that the FOIA "does not apply to matters that are * * * inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." It plainly means that a litigant cannot obtain under the FOIA documents that could not be obtained in civil discovery. Nothing in the language of this provision even remotely suggests that Congress intended to protect certain privileged materials but not others.

2.a. Nor is there any support for the court of appeals' interpretation in the legislative history. On the contrary, the Senate Report (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (hereinafter "Senate Report")) states that the purpose of Exemption 5 "is to protect from disclosure * * * *those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency*" (emphasis added). The Report goes on to note (*ibid.*; emphasis added) that "[t]his would *include* the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." There is, however, nothing to suggest that these two examples were intended as an exhaustive list of the privileges incorporated into Exemption 5. Indeed, this Court has already held that the deliberative process and confidential commercial information privileges, which are not mentioned in this passage, are incorporated into Exemption 5 (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150; *FOMC* v. *Merrill*, *supra*, 443 U.S. at 360).

In concluding that Exemption 5 incorporates only those privileges explicitly recognized in the legislative history, the court of appeals placed primary reliance upon the following passage in the Senate Report (at 9):

> Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

The court of appeals stated (Pet. App. 8a-9a, quoting Senate Report at 9) that "the Senate Report assumes that Exemption 5 would protect only 'legal or policy matters.'" In fact, however, the Report merely noted that agencies had objected to mandatory disclosure of documents discussing legal or policy matters and that Exemption 5, as amended, had been framed to protect such documents to the extent required for "efficient Government operation" (Senate Report at 9). While this passage in the Senate Report made no reference to other privileged documents, it does not follow, as the court of appeals concluded (Pet. App. 9a), that Exemption 5 was meant to protect only documents discussing legal matters.

First, that interpretation would be utterly inconsistent with the Senate committee's amendment of Exemption 5. In the bill referred to the committee (S. 1160, 89th Cong., 1st Sess. (1965)), Exemption 5 was restricted to documents "dealing solely with matters of law or policy," but the committee deleted that requirement and substituted language protecting documents that "would not be available by law to a private party in litigation with the agency." See Senate Report at 1. If Congress had intended to limit Exemption 5's coverage to "legal or policy matters," as the court of appeals maintained (Pet. App. 9a), Congress would not have adopted this amendment, which deleted that very restriction.[16]

Second, the court of appeals' interpretation is inconsistent with the previously noted statement in another part of the Senate Report (at 2) that Exemption 5 protects "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." Neither the attorney-client privilege nor the attorney

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[16] The court of appeals' explanation of this amendment is unconvincing. The court stated (Pet. App. 9a & n.17) that the only purpose of the amendment was to prevent compelled disclosure of documents containing both a discussion of legal or policy matters and factual information. That interpretation is belied both by the amendment's broad language and by the deletion of language expressly tying the Exemption to "matters of law or policy." If the amendment's only purpose had been to authorize nondisclosure of such documents, the word "solely" could simply have been deleted. The Exemption then would have applied to "inter-agency or intra-agency memorandum dealing * * * with matters of law or policy." Or if the amendment had been intended to protect the non-factual portions of such documents, the committee could have easily so provided.

work-product privilege is limited to legal or policy matters; indeed, those privileges often apply to purely factual materials. See *Fisher* v. *United States*, 425 U.S. 391, 403 (1976) (attorney-client privilege protects information disclosed in confidence by a client to an attorney in order to obtain legal assistance); *Hickman* v. *Taylor*, 329 U.S. 495 (1947) (attorney work-product privilege applies to statements made to lawyer by accident witnesses).

b. The House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (hereinafter "House Report")) also shows that Exemption 5 is not limited to the privileges mentioned in the legislative history. That Report states (*ibid.*) that under the FOIA "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." A corollary of this principle, of course, is that any internal memorandums or letters that would not routinely be disclosed to a private party in civil discovery need not be disclosed under the FOIA.[17]

The House Report mentions (at 10) certain specific types of materials covered by Exemption 5—*i.e.*, "advice from staff assistants and the exchange of ideas among agency personal" and certain "documents or information which [an agency] has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." Again, however, there is no reason to believe that this list was meant to be exhaustive, as the court of ap-

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[17] See *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 35 (1967).

peals maintained (Pet. App. 9a-10a).[18] The attorney-client and attorney work-product privileges were not mentioned, despite their incorporation into Exemption 5.[19] And the House Report expressly stated (at 10; emphasis added) that Exemption 5 was "intended to exempt from disclosure * * * *other information and records* wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."

3. Consistent with the statutory language and legislative history, this Court has observed that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); accord, *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 7-8. In a similar vein, the Court has held that "it is reasonable to construe Exemption 5 to exempt *those documents* * * * *normally privileged in the civil discovery context.*"

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[18] While acknowledging (Pet. App. 9a n.8, quoting House Report at 10) that "[t]he House Report speaks broadly of protecting the secrecy of 'documents or information which [a government agency] has received,'" the court of appeals stated (Pet. App. 9a-10a, quoting House Report at 10) that the House Report "contain[s] evidence that Exemption 5 was meant to protect only 'advice from staff assistants and the exchange of ideas among agency personnel.'" In fact, however, the House Report merely said (at 10) that agency witnesses had "contended, and with merit, that advice from staff assistants and the exchange of ideas among personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" That statement did not purport to define the entire scope of Exemption 5's coverage.

[19] See S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965); *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 4; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see also *FTC* v. *Grolier, Inc.*, *supra*, slip op. 7.

Moreover, this Court has repeatedly noted that "[t]he primary purpose of the FOIA was not to benefit private litigants or serve as a substitute for civil discovery." *Baldrige* v. *Shapiro*, 455 U.S. 345, 360 n.14 (1982); see also *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 143 n.10; *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). But if Exemption 5 incorporates only those privileges explicitly recognized in the legislative history, all other civil discovery privileges could be circumvented by use of the FOIA. A civil litigant denied discovery of materials protected by one of the privileges not mentioned in the legislative history could obtain those materials simply by filing a FOIA request. Those privileges would therefore be effectively abolished whenever the information sought is held by the government. Not only would this place the government at a disadvantage relative to other civil litigants, but it would significantly alter the scope of well-established privileges in federal and state suits involving only private parties.[20] It is most unlikely "that Congress would have intended such a result without clearly saying so." *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), slip op. 12.

4. The court of appeals' interpretation of Exemption 5 rested largely upon statements in *FOMC* v. *Merrill*, 443 U.S. 340 (1979). In *Merrill*, this Court prefaced its discussion by remarking that "*it is not*

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[20] In the present FOIA case, for example, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation are seeking privileged information for use in private litigation.

clear that Exemption 5 was intended to incorporate every privilege known to civil discovery" (443 U.S. at 354; emphasis added). The Court also observed (*id.* at 355; emphasis added): "Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 *must be viewed with caution.*"

The court of appeals, however, read far more into *Merrill*. Stating (Pet. App. 6a, quoting 443 U.S. at 359) that the *Merrill* Court "found evidence in the House Report on the FOIA * * * that Congress 'specifically contemplated a limited privilege for confidential commercial information,'" the court of appeals concluded (Pet. App. 6a; emphasis added):

> As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*

The court of appeals' interpretation of *Merrill* is erroneous and, indeed, is inconsistent with the decision in *Merrill* itself. The Court held in *Merrill* that Exemption 5 incorporated a qualified privilege for confidential commercial information, even though that privilege was *not* "explicitly recognized" in the legislative history. Relying upon a sentence in the House Report (at 10) referring to documents or information received by the government "before it completes the process of awarding a contract," the Court in *Merrill* concluded (443 U.S. at 359; emphasis added; footnote omitted): "[*W*]*e think it is reasonable to infer* that the House Report * * * specifically contemplated a limited privilege for confidential com-

mercial information pertaining to such contracts." The Court went on to hold that the Federal Open Market Committee's Domestic Policy Directives are "at least potentially eligible for protection under Exemption 5" (*id.* at 360-361 n.23) and explained (*id.* at 361; emphasis added): "*Although the analogy is not exact*, we think that the Domestic Policy Directives and associated tolerance ranges are *substantially similar* to confidential commercial information generated in the process of awarding a contract." Thus, this Court's decision in *Merrill* was based upon "infer[ence]" and "analogy" rather than explicit recognition by Congress of the privilege at issue.[21]

Purporting to apply what it termed *Merrill*'s "new analysis of the interplay between Exemption 5 and civil litigation privileges" (Pet. App. 5a), the court of appeals found "no evidence in the legislative history that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" (*id.* at 10a). As we show in point B, *infra*, such evidence does in fact exist. But even if the legislative history contained no mention of the privilege at issue in this case, it would not suggest that Congress did not intend to incorporate that privilege into Exemption 5.

As the Court observed in *Merrill* (443 U.S. at 355), "Congress specifically recognized that certain discovery privileges were incorporated into Exemptions 5." But as previously noted, Congress gave no

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[21] The Court noted (443 U.S. at 358 & n.21) that in hearings preceding enactment of the FOIA, the General Counsel of the Treasury Department expressed concern about premature disclosure of information concerning Federal Reserve open market operations.

indication that those examples were meant as an exhaustive list of the incorporated privileges. The privileges mentioned in the congressional committee reports—the deliberative process and attorney privileges—apply to a large volume of government records, and it is thus not surprising that they were singled out. It does not follow, however, that Congress' failure to enumerate the remaining privileges shows that Congress meant to exclude them from the protection of Exemption 5, contrary to the unequivocal language of that provision.

There are many obvious reasons why the congressional committees would have refrained from attempting to compile a complete list of the incorporated privileges. Since Exemption 5 by its terms embraces all internal memorandums or letters normally privileged in civil discovery, no such list was needed. In addition, such comprehensive treatment would not have been in keeping with the very brief treatment of Exemption 5 in the House and Senate Reports. Moreover, by attempting to publish a complete list, Congress would have risked omitting narrow but important privileges, such as the one at issue here. This risk was especially great because the privileges available under federal law were not and still are not codified. See Fed. R. Evid. 501. Furthermore, since the federal law of privileges has been permitted to evolve through adjudication, freezing the privileges incorporated into Exemption 5 might have led to divergence between the coverage of that provision and the privileges recognized in civil litigation. Finally, because the availability and scope of certain privileges has been hotly disputed,[22] an exhaustive list of privileges would have generated needless controversy.

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[22] This is illustrated by the controversy engendered by article V of the Federal Rules of Evidence as submitted to

5. In sum, "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *FTC* v. *Grolier, Inc.*, *supra*, slip op. 7-8, quoting *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, *supra*, 421 U.S. at 184. It follows, therefore, that the statements at issue in this case need not be disclosed under the FOIA. The privilege for confidential statements made to military air crash safety investigators has been well established for more than 20 years. See *Cooper* v. *Department of the Navy*, *supra*; *Brockway* v. *Department of the Air Force*, *supra*; *Machin* v. *Zuckert*, *supra*; *Rabbitt* v. *Department of the Air Force*, 401 F. Supp. 1206 (S.D.N.Y. 1974); *Kreindler* v. *Department of the Navy*, 363 F. Supp. 611 (S.D.N.Y. 1973); *McFadden* v. *Avco*, 278 F. Supp. 57 (M.D.Ala. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965). And there can be no serious question that the witness statements sought by respondents in this case fall within that privilege. An uncontroverted affidavit filed in district court established that the statements were obtained under a pledge of confidentiality in the course of an authorized Air Force safety investigation (J.A. 37-40), and the district court made implicit findings to that effect (Pet. App. 23a-25a).

Congress by this Court. Because of the disagreement created by the nine specific nonconstitutional privileges enumerated in the proposed rules, Congress decided not to codify the privileges recognized by federal law. See Fed. R. Evid. 501. See also S. Rep. No. 93-1277, 93d Cong., 2d Sess. 6-7 (1974); 10 J. Moore & H. Bendix, *Federal Practice* §§ 500.03-500.14 (1982); 23 C. Wright & K. Graham, *Federal Practice & Procedure* § 5422, at 689 (1980); J. Weinstein, *Evidence* ¶ 501[01] (1982).

B. Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, it nevertheless protects confidential witness statements in a military air crash safety investigation

Even if Exemption 5 does not incorporate every privilege recognized in civil discovery, the analysis employed by this Court in *Merrill* shows that the statements at issue here are nevertheless protected against mandatory public disclosure under the FOIA.

In *Merrill*, the Court reviewed the legislative history and found grounds to infer that Congress intended Exemption 5 to incorporate a limited privilege for confidential commercial information (443 U.S. at 357-359). The Court also observed (*id.* at 360) that "recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption." Here, too, there is strong evidence that Congress "specifically contemplated" (443 U.S. at 359) that the statements at issue would be protected, and the *Machin* privilege does not substantially duplicate any other FOIA exemption.

1.a. This Court has previously reviewed the legislative history of Exemption 5. See *FOMC* v. *Merrill*, *supra*, 443 U.S. at 357-358 & n.20; *EPA* v. *Mink*, 410 U.S. 73, 89-90 (1973). As noted, the original Senate bill (S. 1160, 89th Cong., 1st Sess. (1965)) did not contain the present Exemption 5 but instead included an exemption for "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." As this Court has remarked (*EPA* v. *Mink*, *supra*, 410 U.S. at 90-91; footnote omitted):

> This formulation was designed to permit "[a]ll *factual* material in Government records . . . to

> be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters.

As a result of this criticism, Exemption 5 was changed to substantially its present form by the Senate committee. Senate Report at 1; see also *FOMC* v. *Merrill*, *supra*, 443 U.S. at 359; *EPA* v. *Mink*, *supra*, 410 U.S. at 91. The Senate Report explained (at 4) that the committee's amendment "reflect[ed] suggestions made to the committee in the course of the hearings," and it may reasonably be inferred that one of the suggestions that precipitated the amendment concerned the *Machin* privilege.

In a written statement to the Senate committee, the Defense Department referred to the very type of statements involved in this case as an "example[] of the kind[] of information or records which the Department of Defense now considers it essential to treat as privileged but which might not receive protection under [the bill then under consideration]." *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 418 (1965) (hereinafter "*1965 Senate Hearings*"); see also *Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 220 (1965) (hereinafter "*House Hearings*"). The Department wrote (*1965 Senate Hearings* at 418):

> [I]nvestigative files such as aircraft accident investigation reports also contain invaluable in-

> formation that is obtained only by the assurance that it will be treated as privileged. Judicial recognition of the necessity for protecting such information in aircraft accident investigation reports is found in such cases as *Machin* v. *Zuckert*, 316 F.2d 336 (C.A.D.C. 1963), where the legitimate interests of the Government in promoting air safety was recognized by the court as a valid reason for denying to the litigants access to the accident report. * * * [T]he continued protection of the information obtained in the course of these exchanges is absolutely essential to the continued flow of information vital to the effective and efficient management of the Defense Establishment.[23]

See also *House Hearings* at 220.

Assistant Attorney General Schlei testified that the bill referred to the committee appeared to require, among other things, "the availability of information submitted in confidence to investigators in aircraft investigations * * *. It is obvious that these changes are not intended by the proponents" (*1965 Senate Hearings* at 196). In his written statement, Assistant Attorney General Schlei elaborated (*id.* at 206):

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[23] The Defense Department also reiterated and endorsed (*1965 Senate Hearings* at 419) Professor Kenneth Culp Davis's statement during the 1964 Senate Hearings (*Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 248 (1964)), that the FOIA exemption provision as then framed "will do little if any good, and it will do an immense amount of harm. It will prevent agencies from receiving confidential information in writing from private parties, and for that reason it will not have the effect of opening up the confidential information to the public." See also *House Hearings* at 221.

> It would seem evident that if persons interviewed by investigators are to have no assurance that what they divulge will not be published, the free flow of information necessary to the effective performance of regulatory, benefit, and other agency functions from complainants and witnesses surely will be seriously jeopardized. In many cases persons sought to be interviewed * * * will refuse to talk to agency investigators and employees as soon as they realize that all information furnished by them may be made public.

See also *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 212 (1964) (hereinafter "*1964 Senate Hearings*").

The Civil Aeronautics Board, which then had the responsibility for investigating the causes of civilian aircraft accidents,[24] objected because the predecessor of Exemption 5 under consideration was limited to "memorandums and letters dealing solely with matters of law or policy" and did not include those containing a discussion of facts. *1965 Senate Hearings* at 366-367. The Board also contended (*id.* at 367) that opening up "investigatory files developed in discharge of the Board's responsibility * * * for ascertaining the cause of aircraft accidents, and making recommendations designed to avoid future such accidents * * * would be contrary to the public interest

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[24] See Pub. L. No. 89-670, Sections 5(c) and 6(d), 80 Stat. 935, 938, which transferred that authority to the National Transportation Safety Board ("NTSB"), then a part of the Department of Transportation. For the NTSB's present responsibilities in this field, see 49 U.S.C. 1441-1443.

as well as impede the discharge of the Board's responsibilities in this area." See also *House Hearings* at 237.[25]

During the hearings preceding enactment of Exemption 5, no witness or member of Congress expressed the view that statements such as those involved here should be subject to mandatory disclosure. Thereafter, Exemption 5 was amended by the Senate committee to shield "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." See Senate Report at 9. Exemption 5 was enacted in this form (Pub. L. No. 89-487, Section 3(e), 80 Stat. 251) and remains essentially unchanged.[26]

In sum, we think it may fairly be inferred from the following facts that Exemption 5 was specifically intended to protect witness statements like those at issue in this case: such statements would not have been protected by the original bill but fall within the plain meaning of Exemption 5 as amended by the Senate committee and ultimately enacted; the Senate committee stated that its amendment was made in

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[25] The Board raised these objections even though its practice was to release almost all factual information concerning aircraft accidents (see *1965 Senate Hearings* at 366; *House Hearings* at 237). For a comparison of the use of confidential statements in military and civilian aircraft accident investigations, see page 36 note 29, *infra*.

[26] When the FOIA was codified in 1967, together with the other 1966 amendments to the Administrative Procedure Act, the words "a party other than an agency" were substituted for "private party" (Pub. L. No. 90-23, Section 1, 81 Stat. 55). See also H.R. Rep. No. 125, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 248, 90th Cong., 1st Sess. 2 (1967).

response to suggestions voiced at the committee hearings; a number of government witnesses at those hearings referred specifically to the very type of statements involved here, noted that such statements were apparently not shielded from compulsory disclosure under the bill then under consideration, and argued that disclosure of such statements should not be required; and no witness or member of Congress suggested during the hearings that mandatory disclosure of such statements was desirable. Thus, the analysis employed in *Merrill* leaves little doubt that the statements sought by respondents are protected from disclosure by Exemption 5. See *FOMC* v. *Merrill*, *supra*, 443 U.S. at 359.

b. The *Machin* privilege also does not "substantially duplicate any other FOIA exemption" (*FOMC* v. *Merrill*, *supra*, 443 U.S. at 360). In most instances, statements such as those at issue here are not classified documents (Exemption 1), do not relate solely to agency personnel rules or practices (Exemption 2), are not specifically exempted from disclosure by any other statute (Exemption 3), do not contain confidential or privileged trade secrets or commercial or financial information (Exemption 4), do not contain information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (Exemption 6), are not "investigatory records compiled for law enforcement purposes" (Exemption 7), are not contained in or related to reports prepared by, on behalf, or for the use of an agency that regulates or supervises financial institutions (Exemption 8). and do not contain "geological and geophysical information and data * * * concerning wells" (Exemption 9).

2. Incorporation of the *Machin* privilege into Exemption 5 would be fully consistent with the purposes underlying the Freedom of Information Act.

To begin with, protecting confidential statements made to military air crash safety investigators would not contravene the "strong congressional aversion to 'secret [agency] law' " (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 153). Such statements are obviously not "law" because they are not rules that govern the adjudication of individual rights or require particular conduct or forbearance by the public. See *Cuneo* v. *Schlesinger*, 484 F.2d 1086, 1091 n.13 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

By the same token, the *Machin* privilege fully comports with the dual goals of the FOIA "to permit access to certain kinds of official information * * * that ought to be public [while shielding] * * * certain information where its confidentiality [is] necessary to protect legitimate governmental functions that would be impaired by disclosure." *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 262 (1975). Although the Act "establish[es] a general philosophy of full agency disclosure," it also recognizes that it is "necessary for the very operation of our Government to allow it to keep confidential certain material" Senate Report at 3. The *Machin* privilege, as invoked by the military, sweeps no broader than is necessary to further compelling government interests.

From the outset, the *Machin* privilege has been applied only to a narrow category of information—statements made by witnesses in military air safety investigations in reliance upon promises of confidentiality, and "any conclusions that might be based in any fashion on such privileged information."

Machin v. *Zuckert*, *supra*, 316 F.2d at 339.[27] The privilege has been upheld because the courts have recognized that such statements could not be obtained without the assurance of confidentiality. *Id.* at 339; *Cooper* v. *Department of the Navy*, *supra*, 558 F.2d at 277; *Brockway* v. *Department of the Air Force*, *supra*, 518 F.2d at 1193. Other information—including the names of the witnesses, factual data generated by the safety investigation, and the record of the collateral investigation—is routinely released. See A.F. Reg. 127-4 (Jan. 1, 1973) (Pet. App. 31a-32a). Moreover, the privilege does not prevent witnesses in the safety investigation from being asked to testify elsewhere, and they are permitted to refresh their memories prior to such testimony by reviewing the statements made by them to the safety board. See *Brockway* v. *Department of the Air Force*, *supra*, 518 F.2d at 1186; *Rabbitt* v. *Department of the Air Force*, *supra*, 401 F. Supp. at 1209. In addition, mindful of the need to release as much information as possible regarding air crash investigations, the Air Force in 1972 restructured and expanded its collateral investigations in order to create a more comprehensive public record for the use of litigants and others and to obviate any perceived need for public access to confidential witness statements. See A.F. Reg. 110-14 (Feb. 29, 1972); see also Burton, *supra*, 14 JAG L. Rev. at 233-

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[27] Other privileges, such as the deliberative process privilege, may cover other information gathered in investigations of aircraft mishaps. See Pet. App. 12a; *United States* v. *Reynolds*, 345 U.S. 1 (1953) (military secrets); *Machin* v. *Zuckert*, *supra*, 316 F.2d at 339 (deliberative process privilege).

234.[28] The *Machin* privilege, therefore, does not operate to reduce the amount of information available to the public. Rather, the privilege simply makes it possible for the government to obtain information that would otherwise be unavailable to anyone for any purpose (*Cooper* v. *Department of Navy, supra*, 558 F.2d at 277) and that is crucial to the performance of an essential government function.

In short, no purpose of the FOIA would be served by mandatory disclosure of the confidential witness statements furnished to military air crash safety investigators. Exemptions to the FOIA must be given a reasonable interpretation in order to accomplish the purposes of the Act. See *Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982); *FBI* v. *Abramson*, 456 U.S. 615 (1982). The FOIA's overriding goals are to promote open government (*Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974)) and "to ensure an informed citizenry * * * [in order] to hold the governors accountable to the governed" (*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). But disclosure of confidential statements made to military safety investigators is unlikely to promote open government, an informed citizenry, or any other beneficial purpose. If confidentiality cannot be ensured, statements provided as part of a safety investigation will not reveal anything beyond that uncovered by the parallel collateral investigation. As a result, the information available to the public will not be increased appreciably, while the information available to those charged

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[28] These procedures were in effect at the time of the accident giving rise to this litigation.

with achieving aircraft safety will decrease both in quantity and reliability.

3. As previously noted, the court of appeals' construction of Exemption 5 was based primarily upon the Senate and House Reports and this Court's decision in *Merrill*, all of which we have already discussed. The court's remaining reasons for requiring disclosure of confidential witness statements under the FOIA are also unpersuasive.

The court of appeals relied (Pet. App. 10a) upon the statement in *EPA* v. *Mink*, *supra*, 410 U.S. at 89, that Exemption 5 "requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual investigative matters on the other." However, the point of the statement in *Mink* was that the scope of the deliberative process privilege is no greater under the FOIA than in civil litigation, where "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties" (410 U.S. at 87-88). *Mink* certainly did not hold that this limitation upon the deliberative process privilege applies to all other privileges incorporated into Exemption 5. In fact, as noted above (see pages 17-18, *supra*), the Exemption unquestionably covers purely factual material protected by the attorney-client or work-product privilege.

Finally, the court of appeals (Pet. App. 17a-18a & n.12), like respondents (Weber Br. in Opp. 9-10; Mills Br. in Opp. 17-19), suggested that the government failed to establish that releasing statements such as those at issue here would impair military aircraft safety. However, the government had no obligation

in this case to prove that there is a sound empirical basis for the *Machin* privilege; the only issue is whether that privilege was incorporated into Exemption 5. In any event, common sense and the affidavits submitted below (see pages 7-8, *supra*) amply support the proposition that witnesses are more likely to be candid when their statements are made under premises of confidentially. As the Fifth Circuit aptly put it (*Cooper* v. *Department of the Navy*, *supra*, 558 F.2d at 277):

> [I]n the circumstances of an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures. After all, something has gone wrong—perhaps gravely, even mortally wrong—under circumstances inherently dangerous. The machines and the procedures being employed are generally uniform and will be employed again tomorrow in the same manner unless altered. Is there something wrong with them generally? Or did the mishap (or catastrophe) occur because of a particular defect in a particular machine? Does a crew-chief believe (though not with enough confidence to swear to it) that a pilot was unwell or distracted on the occasion of a fatal flight? Does he recall that he forgot to secure some important assembly of the craft before the flight? To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety

> Investigation, where [promises] of confidentiality have been found helpful and perhaps essential to obtaining information upon which to base corrective action, those promises should be respected and the answers and speculations which they produce shielded from disclosure.

See also *Brockway* v. *Department of the Air Force*, *supra*, 518 F.2d at 1194.[29]

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[29] Respondent Weber Aircraft Corporation has argued (Br. in Opp. 9-10, 19-20) that the *Machin* privilege is unnecessary because witness statements taken by the National Transportation Safety Board, which investigates civilian aircraft accidents, are not privileged. This argument, however, has little if any bearing upon the question whether the *Machin* privilege is incorporated into Exemption 5. Moreover, fundamental differences between the NTSB's procedures and those of military investigators make facile comparisons concerning the treatment of witness statements of minimal value. For example, witnesses may be compelled to testify in NTSB investigations (see 49 C.F.R. 845.21(c)), whereas military investigators conducting safety investigations lack authority to subpoena witnesses (see page 3 & note 3, *supra*) and must therefore rely upon promises of confidentiality to obtain cooperation. The NTSB's reports may not be used in litigation concerning the accident (49 U.S.C. 1441(e)), and the NTSB is not required to release any document protected under FOIA exemptions (49 U.S.C. 1905). Thus, while statements furnished directly to the NTSB may be released, if our interpretation of Exemption 5 is correct, the NTSB would not be required to release the statements involved in this case if supplied to it by the military.

Furthermore, the authorities responsible for civilian aircraft safety have recognized that information furnished in confidence by pilots, air traffic controllers, and others may be of vital importance in preventing accidents and loss of life. Under the Aviation Safety Reporting Program, the National Aeronautics and Space Administration receives information relating to aviation safety and, to preserve confidentiality,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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removes all identifying details as soon as possible. Based upon this information, NASA prepares reports, statistical summaries, and recommendations for the Federal Aviation Administration and other agencies with responsibilities in the field. See 44 Fed. Reg. 24980-24982 (1979). Periodic evaluations of this program have concluded that confidentiality is essential to its success. NASA Advisory Subcomm. on Aviation Safety Reporting System, *Supplementary Report on ASRS Utility and Effectiveness* 11-12 (1981); NASA Advisory Subcomm. on Aviation Safety Reporting System, *Report on ASRS Utility and Effectiveness* 6, 11 (1979); NASA Research and Technology Advisory Council, *Evaluation of Aviation Safety Reporting System* 24 (1977).

APPENDIX

Air Force Regulation 127-4 (Jan. 18, 1980) provides in pertinent part:

> 2-4. Limitations on the Use of Safety Reports. The Air Force investigates mishaps to find the causes and prevent recurrence. Investigators, witnesses, and people who work with safety reports need to know the limitations placed on using the reports.
>
> a. Aircraft, Missile, and Nuclear Safety Mishap Reports. These are limited-use reports. The sole purpose of these reports, their attachments, and related documents is to prevent mishap recurrence. No other use is authorized.
>
> * * * * *
>
> 2-5. Limited-Use Reports. The Air Force claim of privilege for limited-use reports stems from Executive privilege. This is based on the constitutional provisions for separation of powers among the three branches of government. The claim of privilege for mishap reports (commonly referred to as evidentiary privilege) is based on the larger claim of Executive privilege. Evidentiary privilege is needed to make sure our reports effectively prevent mishap recurrence and thereby strengthen combat capability. Therefore the following procedures and restrictions apply to limited-use reports.
>
> a. The Promise of Confidentiality. These reports and all related documents are prepared by, for, or at the direction of The Inspector General, US Air Force. They are internal communications of the Air Force, pertaining to safety, and their only purpose is to prevent mishaps. In-

vestigators need to assess all available evidence to best serve this purpose. Such evidence includes information known by persons directly or indirectly involved in mishaps. Frank and open exchange of such information is vital in determining causes and recommending corrective actions. Therefore, a promise of confidentialty is given to all persons who give information to investigators of weapon systems mishaps. To back up this promise, the claim of privilege is made for these reports, including messages and other related documents.

b. Prohibitions on Use Within the Air Force. These reports and their attachments may not be used as evidence for disciplinary action, nor as evidence in determining the misconduct or line-of-duty status of any personnel. Using them as evidence before flying evaluation boards or to determine pecuniary liability is also prohibited. Finally, except as stated in d below, they may not be used as evidence to determine liability in claims against the US Government.

c. Prohibitions on Disclosure Outside the Air Force. These reports and their attachments are not released outside the Air Force for purposes of litigation, except as in d below. This includes requests from the Department of Justice or any US Attorney. These prohibitions include any action by or against the US. Limited-use reports are used solely within the Air Force to prevent mishaps. They are not appended to nor enclosed in any other report or document unless the sole purpose is to prevent mishaps. This prohibition includes preliminary, supplemental, and progress reports and part II of formal reports on AF

Forms 711. It also applies to special mishap investigation reports and evaluations prepared by the Directorate of Aerospace Safety.

d. Conditions for Limited Disclosure. Despite the above restrictions, the factual parts of limited-use mishap reports must be released in certain cases. These factual parts consist essentially of part I of the formal report. They are released as follows:

(1) As required by the Freedom of Information Act (5 U.S.C. 552, as amended by Public Law 93-502). The disclosure authority for requests made under the Freedom of Information Act is the Commander, Air Force Inspection and Safety Center. (See AFR 12-30, tables 1 and 2, and paragraph 12.) Send requests to HQ AFISC/DADF, Norton AFB CA 92409.

(2) If there is an AFR 110-14 investigation of the same mishap, the safety investigator(s) gives the accident investigator the factual material in part I of the formal report. (See AFR 110-14 and paragraph 3-8e of this regulation.)

(3) Federal law also requires that a person who is accused in a trial by court martial will, upon proper court order, be given certain material. That person should be furnished all statements, sworn or unsworn, in any form which have been given to any federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

* * * * *

3-8. Investigative Evidence:

* * * * *

d. Witnesses. Physical and documentary evidence are the most credible forms of evidence.

However, the accounts of witnesses often provide important (and sometimes the only) leads as to the causes. Witnesses include those involved in the mishap, those who only saw it, and those whose training and experience qualifies them as experts. The appearance of witnesses before an investigator or board is governed by the following:

* * * * *

(3) Witnesses in aircraft, missile, or nuclear safety investigations are advised before testifying of the purpose of the investigation. The sole purpose of the investigation is to determine all factors relating to the mishap in order to preclude recurrence. The basis for this advice is the Air Force claim of privilege for the statements given in confidence by these witnesses (paragraph 2-5). It is a guarantee of confidentiality and is given to encourage frank and open communications.

* * * * *

5-1. a. The Two-Part Report. The formal report has two parts: Part I, Facts, and part II, Nonfactual Data. The AF Forms 711 are designed for two functions. First they show needed information for use in mishap prevention. The second function is to segregate factual information which may be disclosed outside the Air Force. In this way, the two-part report aids retention of privileged information and protects the privacy of medical information.

* * * * *

5-2. What to Include in the Two-Part Report. The following describes the forms and other data normally needed and tells which tabs to place

them under. Sometimes the circumstances of a mishap are such that certain normally required forms or exhibits would not add to the report. When this is the case, AFISC will consider a request to omit them. Requests should be submitted by message to HQ AFISC/SER.

a. Part I—Facts:

* * * * *

b. Part II—Board of Investigator Analysis:

(1) Tab T, Investigation, Analysis, Findings, and Recommendations. This is the most important part of the report. It draws on all portions of the report to provide a complete picture of what happened. This is followed by a thorough analysis of all evidence, then findings, causes and recommendations. This section records the opinions of the board. It should accept or reject all evidence in the report. Only in the case of a formal minority report should there be differing findings, causes, or recommendations. Chapter 12 deals with this portion of the report in more detail. (Note: For aircraft nonflight mishaps, place the AF Form 711ab at this tab.)

(2) Tab U, Statements and Testimony of Witnesses and Persons Involved. Statements should be taken from all individuals concerned with the mishap or who were eyewitnesses to it. (The locally reproduced statement format in attachment 3 is used in formal limited-use reports.) If more than one statement is obtained from an individual, all should be included at this tab. The board may select for inclusion those statements and testimony that are meaningful. It is not always necessary to include all statements. However, a complete list of all witnesses con-

tacted is provided to the accident investigation. When an individual gives further testimony before the board, that too is included at this tab. The statements and testimony of each individual are placed together in chronological order with the earliest on top. Their proximity makes it easier to compare the individual's impressions. All statements and testimony included at this tab must be considered in the analysis at tab T.

(3) Tab V, Rebuttals. When an Air Force individual is cited as causal in a mishap, he or she may rebut the conclusion. The individual submits either a statement of rebuttal or a statement declining rebuttal (atttachment 4). Refer to paragraph 2-10 for details. This does not apply to ground or explosives mishaps, unless they involve Air Force aircraft or missiles.

(4) Tab W, Technical and Engineering Evaluations of Material (Contractors). Engineering evaluations and TDRs done by contractors are privileged. They are included at this tab. Technical evaluations by contractor personnel assisting the board are included here and considered by the board in its analysis.

(5) Tab X, AF Form 711f, Nuclear Accident/Incident Report, is submitted on:

(a) Nuclear accidents and incidents.

(b) Flight and missile mishaps in which nuclear material is also involved.

(6) Tab Y, AF Form 711gA and B, Life Sciences Report of an Individual Involved in an AF Accident/Incident. Submit these forms as explained in chapter 11.

(7) Tab Z, Board Proceedings. Use of this tab is optional. Investigation boards may use this tab to tell reviewing agencies about investigation problems and to make recommendations for improving reporting and investigating procedures. Comments on technical circumstance which was coordinated through AFISC are still appropriate.

Attachment 3

WITNESS STATEMENT FORMAT

I, (Name) , Rank (Organization) , having first been advised that this investigation is being conducted solely for mishap prevention purposes within the US Air Force and that this statement will not be disseminated outside the US Air Force or used as evidence in disciplinary actions or adverse administrative actions such as a Flying Evaluation Board, determining line-of-duty status or pecuniary liability or elimination from the US Air Force, but is to determine all factors relating to the mishap and to avert recurrence, do hereby make the following statement.

(For aircraft, missiles, or nuclear mishaps. This attachment depicts the approved format, except for size, and its content only. Use 8½- by 14-inch paper for inclusion in mishap reports.)

FOR OFFICIAL USE ONLY

This is a limited-use document not releasable in whole or in part to persons or agencies outside the Air Force without the express approval of the disclosure authorities specified in AFR 127-4.

Air Force Regulation 110-14 (July 18, 1977) provides in pertinent part:

INVESTIGATIONS OF
AIRCRAFT AND MISSILE ACCIDENTS

This regulation states policy, establishes responsibilities, and prescribes uniform procedures for conducting and reporting aircraft and missile "accident investigations" other than "safety in-

vestigations" prescribed by AFR 127-4. It applies to all US Air Force activities.

* * * * *

1. Terms Explained:

a. Aircraft or Missile Accident Investigation. An investigation of an aircraft or missile accident conducted by an officer or board appointed under this regulation. It is to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes.

b. Safety Investigation. An investigation of an aircraft or missile accident conducted by an officer or board appointed under AFR 127-4 and used solely for accident prevention.

2. Air Force Policy on the Investigation of Aircraft and Missile Accidents. Aircraft or Missile Accident Investigations under this regulation are separate and apart from Aircraft or Missile Safety Investigations under AFR 127-4. Safety Investigations under AFR 127-4 take priority over other investigations in interviewing witnesses, obtaining and analyzing evidence, and inspecting the scene of the accident. Investigations directed under this regulation are conducted at the same time as, but do not interfere with, Safety Investigations. The following rules apply:

a. These reports are completely released to the news media, litigants, Congressmen, and other members of the general public on request and payment of applicable fees.

b. Members of the Safety Investigation Board are not assigned to conduct an Aircraft or Missile Accident Investigation of the same accident in any capacity.

c. Officers assigned to conduct an investigation under this regulation may not attend the Safety Investigation Board proceedings.

d. Officers currently assigned and performing safety duties should not be appointed to conduct an investigation under this regulation.

e. Testimony, in any form, given to the Safety Investigation Board may not be used or compared—either in whole or in part—by anyone conducting this investigation. Testimony to the Safety Investigation Board is given with the understanding that it will be used only for accident prevention purposes.

f. Witnesses who appeared before a Safety Investigation Board must not:

(1) Reveal what testimony, opinions, analyses, speculations, or recommendations they gave to the Safety Investigation Board.

(2) Disclose what testimony, findings, recommendations, or cause factors are in a Safety Investigation Report. These restrictions apply to any person who may have knowledge of a Safety Investigation Report and who may be called as a witness before any other proceedings (such as an Aircraft or Missile Accident Investigation). All witnesses in this investigation must be informed of its nature and of the possible use of such

testimony in adverse actions, litigation, and claims. This is to make sure that they are fully aware of the differences between the two investigations. See attachment 3 for a sample advice.

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6. Investigative Procedures:

a. The President of the Aircraft or Missile Accident Investigation Board or the Investigating Officer should follow the preliminary steps outlined in attachment 1.

b. The purpose of the Aircraft or Missile Accident Investigation is to gather all relevant facts and records regarding a particular accident in a single report. Because this investigation is factual in nature, the opinions, conclusions, and recommendations of the investigator must not be included in the report. A factual summary of the evidence must be included in the report.

c. The President of the Safety Investigation Board provides the Aircraft or Missile Accident Investigator with the required number of copies of Part I of the Safety Report. He will include all original records in Part I that have been obtained by the Safety Investigation Board and a list of all witnesses who testified or provided statements to the Safety Investigation Board. Documents in Part I of the Safety Investigation Report should be provided to the Aircraft or Missile Accident Investigator as they become available. The President of the Safety Investigation Board also notifies the board or investigating officer under this reg-

ulation when the Safety Board has released the wreckage.

d. Witnesses' statements, testimony, data provided in confidence by manufacturers, board proceedings, findings, conclusions, opinions, and recommendations in the Safety Board Report must not be released to an Aircraft or Missile Accident Board or Investigating Officer.

e. Witnesses:

(1) May not testify in this investigation until they have been released by the Safety Investigation Board.

(2) Should be interviewed as soon as they are released by the President of the Safety Investigation Board.

(3) If suspected of a criminal offense, are advised of their constitutional rights, or of the provisions of UCMJ, Article 31, as appropriate (see attachment 3).

(4) Members or employees of the US Air Force must appear when called by the President of the Aircraft or Missile Accident Investigation Board or the Investigating Officer, as applicable.

(5) Members or employees of the US Air Force must testify under oath or affirmation, unless they refuse to testify on grounds of self-incrimination (see attachment 3).

f. Commanders make technical advisors (for example, maintenance, medical, legal, personnel, etc.) available to investigators. Such advisors need not be appointed on orders and will perform duties as determined

necessary by the Aircraft or Missile Accident Investigation Board or investigator.

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Attachment 3

ADVICE TO WITNESSES

I am ————————. (I am) (We are) appointed to conduct an accident investigation which will gather all the facts and circumstances surrounding the ———————— (aircraft) (missile) accident which occurred on ——— near ————————. This investigation is separate and apart from the safety investigation conducted under AFR 127-4. The purpose of this accident investigation is to obtain and preserve all available evidence for use in claims, litigation, disciplinary actions, adverse administrative proceedings, and for all other purposes. Testimony before the safety aircraft accident investigation board is given with the understanding that it cannot be used for other than mishap prevention purposes and all witnesses are advised that it will be treated in confidence. However, testimony given in this accident investigation may be used for any purpose deemed appropriate by competent authority, and may be publicly disseminated. Do you understand the difference between the safety investigation and this accident investigation?

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